1992

State of Utah v. Fernando Ruesga : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
FERNANDO RUESGA,	:	Case No. 920426-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

This is an appeal from an order revoking probation and the imposition of a previously suspended prison sentence for unlawful possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. section 58-37-8(2)(a)(i), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Timothy R. Hanson, Judge, presiding.

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STATEMENT OF JURISDICTION

Utah Code Ann. section 78-2a-3(2)(f)(1992 Supp.) provides this Court's jurisdiction over this appeal from a non-capital, non-first degree felony conviction from a court of record.

STATEMENT OF ISSUES

1. Was signing the Adult Probation and Parole agreement a valid condition of probation at the time of Mr. Ruesga's refusal to sign?

2. Did Mr. Ruesga willfully violate a condition of probation?

3. Are the trial court's written and oral findings clearly erroneous?

STANDARDS OF REVIEW

The trial court's factual findings are reversible if clearly erroneous, while the trial court's legal conclusions are subject to the correction of error standard of review. State v. Martinez, 811 P.2d 205, 208 (Utah App.), cert. denied, 815 P.2d 241 (Utah 1991). Because the trial court did not draft the findings

himself, but adopted those drafted by counsel, the written findings are entitled to less deference on review. See Automatic Control Prods. Corp. v.Tel-Tech, Inc., 780 P.2d 1258, 1263 (Utah 1989)(Zimmerman, J., concurring), cited with approval in State v. Rio Vista Oil, Ltd., 786 P.2d 1343, 1347 (Utah 1990).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

The following controlling statutes, rules and constitutional provisions are in Appendix 1:

United States Constitution, Amendment XIV
Constitution of Utah, Article I section 7
Utah Code Ann. section 77-18-1
Utah Code Ann. section 77-32-1
Utah Rule of Criminal Procedure 15.

STATEMENT OF THE CASE

The State charged Mr. Ruesga with one count of unlawful possession of a controlled substance, a third degree felony violation of Utah Code Ann. section 58-37-8(2)(a)(i) (R. 7).[1] On February 18, 1992, Mr. Ruesga pled guilty to that charge (R. 19). The trial court ordered him to remain unincarcerated and under the supervision of Pretrial Services while Adult Probation and Parole prepared the presentence investigation report (R. 20). On March

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1. Mr. Ruesga will refer to the district court pleadings file as "R.", to the transcript of April 6, 1992, as "T.", to the transcript of May 4, 1992, as "T.2", to the transcript of May 18, 1992, as "T.3", to the transcript of June 2, 1992, as "T.4", and to the transcript of June 22, 1992, as "T.5".

23, 1992, the trial court ordered Adult Probation in a minute entry as follows: "The matter is referred back to APPD to obtain a more complete criminal history and to make the necessary matrix corrections. If APPD recommends prison, they must state their reason(s) for said deviation." (R. 30).

On April 6, 1992, the trial court sentenced Mr. Ruesga to a prison term of zero to five years and fined him $5,000 (R. 33-34). The court stayed the sentence pending the completion of 18 months probation, requiring Mr. Ruesga to serve six months in jail, and suspended all of the fine except $1,500 (and required the payment of a 25% surcharge)(R. 33-34, T. 8-9).

On April 27, 1992, Mr. Ruesga's probation officer filed a motion for an order to show cause why Mr. Ruesga's probation should not be revoked because he had failed to sign the probation agreement (R. 38-39). At the first hearing, on May 4, the trial court indicated that defense counsel could have two weeks to work things out, and informed Mr. Ruesga that signing the probation agreement was a condition of his probation (T.2 4, R. 36-37). On May 18, 1992, Mr. Ruesga was willing to sign the probation agreement, but the trial court set a further hearing on the order to show cause (R. 43, T.3 3, 8). Following an evidentiary hearing on June 2, 1992, the trial court denied Mr. Ruesga's motion for a Spanish-speaking interpreter, and revoked Mr. Ruesga's probation, despite Mr. Ruesga's willingness to sign the agreement (R. 45-46, T.4 27).

The state submitted proposed findings of fact in support of the revocation, to which defense counsel objected (R. 57-58), but

the trial court signed the findings (R. 81). Defense counsel moved the trial court to reconsider his ruling (R. 82-83), and to stay the sentence pending appeal (R. 51-52), but the trial court denied these motions (R. 88-89).

On September 16, 1992, this Court granted Mr. Ruesga's petition for a certificate of probable cause, and remanded the case to the trial court for evaluation of evidence under Utah Code Ann. section 77-20-10(1)(c) and setting of conditions of release under section 77-20-10(2).

STATEMENT OF FACTS

The trial court revoked Mr. Ruesga's probation because Mr. Ruesga did not sign the probation agreement presented to him in the jail by two probation officers ten days after sentencing. A copy of the trial court's written findings of probation violation is in appendix 2 to this brief. As defense counsel argued, Mr. Ruesga's initial failure to sign the probation agreement was not a willful violation of probation -- the trial court did not initially inform Mr. Ruesga that signing the agreement was a condition of his probation (T.4 10-11). Once the trial court informed Mr. Ruesga that signing the agreement was a condition of probation (T.2 4), Mr. Ruesga was consistently willing to sign (T.3 3, T.4 11, T.5 5).

SUMMARY OF ARGUMENT

In punishing Mr. Ruesga for failing to understand and

comply with a condition of probation that was not communicated to Mr. Ruesga before the purported violation of that condition of probation, the trial court violated due process of law.

Once Mr. Ruesga learned that signing the probation agreement was a condition of probation, he was consistently willing to fulfill that obligation. Mr. Ruesga never willfully violated probation.

The trial court's oral and written findings in support of probation revocation are clearly erroneous and should be reversed.

ARGUMENT

I.
SIGNING THE PROBATION AGREEMENT WAS NOT A CONDITION OF PROBATION AT THE TIME THAT MR. RUESGA REFUSED TO SIGN THE AGREEMENT.

Our courts have historically recognized the value of probation to both probationers and society, and have consistently held that probation and parole revocation must be fair. See Gagnon v. Scarpelli, 422 U.S. 778, 783-84 (1973)(the purpose of probation is to keep individuals functioning as productive members of society); Morrissey v. Brewer, 408 U.S. 471, 484 (1971)(society's interest in parolee's re-integration into society is disserved by arbitrary revocation of parole); Bearden v. Georgia, 461 U.S. 660, 666 n.7 (1983)(probation revocations must be fundamentally fair, in accordance with federal substantive due process). In State v. Zolantakis, 259 P. 1044 (Utah 1927), the Utah Supreme Court recognized that if the values of probation are to be realized,

courts must deal fairly with probationers, stating,

> The purpose of the law permitting the suspension of sentence is clearly reformatory. If those who are to be reformed cannot implicitly rely upon promises or orders contained in the suspension of sentence, then we may well expect the law to fail in its purpose. Reformation can certainly best be accomplished by fair, consistent, and straightforward treatment of the person sought to be reformed. It would therefore seem, both upon authority and principal, that when a sentence is suspended during good behavior, without reservations, the person whose sentence is thus suspended has a vested right to rely thereon so long as such condition is complied with. The right to personal liberty is one of the most sacred and valuable rights of a citizen, and should not be regarded lightly. The right to personal liberty may be as valuable to one convicted of crime as to one not so convicted, and so long as one complies with the conditions upon which such right is assured by judicial declaration, he may not be deprived of the same. Such right may not be alternatively granted and denied without just cause.

Id. at 1046.

Utah historically has guarded the fairness that must govern probation revocation, by providing greater procedural protections in probation revocations than prevail under the federal constitution.[2]

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2. Compare Morrissey v. Brewer, 408 U.S. 471, 489 (1971)(stating federal due process standards for parole revocation), and Gagnon v. Scarpelli, 422 U.S. 778, 782 (1973)(Morrissey procedural rules apply to probation revocations) with Christiansen v. Harris, 163 P.2d 314 (Utah 1945)(stating Article I section 7 due process standards for probation revocation). Compare Gagnon v. Scarpelli, 422 U.S. 778, 790-91 (1973)(courts are to decide case by case whether counsel is necessary in probation revocation hearings) with State v. Eichler, 483 P.2d 887, 889 and n.7 (Utah 1971)(under Article I section 12, if a probationer requests counsel at a revocation proceeding, he is entitled to counsel).

Perhaps the most important guideline in insuring fairness and success in probation is the rule that courts must state the conditions of probation clearly, so that probationers can comply with them. In Douglas v. Buder, 412 U.S 430 (1973)(per curiam), the Court held that as a matter of due process of law, a probationer must have fair advanced warning of the conduct which constitutes a probation violation. Id. at 432. See also State v. Hodges, 798 P.2d 270, 277 (Utah App.)(expanding conditions of probation violates "'the requirement that a probationer be clearly and accurately apprised of the expectations for remaining on probation.' See State v. Denney, 776 P.2d 91, 93 (Utah Ct.App.1989)(probation sentences must be rendered with clarity and accuracy in order to avoid the possibility of confusion and injustice)[, cert. denied, 779 P.2d 688 (Utah 1989)]; Rich v. State, 640 P.2d 159, 162 (Alaska Ct.App. 1982)(probation conditions must be sufficiently precise and unambiguous to inform probationer of conduct essential to retain liberty)."), cert. denied No. 900501 (Dec. 26, 1990). As the record discussed below demonstrates, at the time that Mr. Ruesga refused to sign the probation agreement, the trial court had not informed Mr. Ruesga that signing the agreement was a condition of his probation.

In sentencing Mr. Ruesga, the trial court stated various conditions of probation, but made no mention of a need to sign a probation agreement, or of other conditions of probation. The court's oral sentence is copied in Appendix 3 to this brief, and states,

> I am going to place you on probation for a period of eighteen months, supervised by Adult Probation and Parole under the following terms and conditions. I'll suspend all but $1,500 of the fine. Added to that is the twenty-five percent surcharge. The Court is satisfied that terms and conditions ought to include the usual drug and alcohol conditions. You're not to use controlled substances, you're not to have paraphernalia in your possession, you're not to associate with people who use controlled substances, and you are not to have any prescriptions, or -- from a medical Doctor, without your probation officer knowing about it.
>
> As far as alcohol, you're not to use alcohol during the period of time that you're on probation. You are to enter into, and successfully complete any drug or alcohol programs Adult Probation and Parole thinks [are] appropriate. Not to, like I say, use alcohol. You're not to frequent bars during the period of time that you're on probation. I want you working full-time, and I want you to establish a permanent address.
>
> The sanction in this, Mr. Ruesga, will be that you serve six months in the county jail. I'll give you credit for the twenty-one days that you've already served. Commitment is forthwith. Take him into custody.

(T. 8-9).

The trial court's written judgment, sentence and commitment, a copy of which is in Appendix 4 to this brief, provides a list of conditions not mentioned orally by the trial court, including the obligation to conform to general conditions of probation (R. 34). This sheet was apparently sent to defense counsel at some point (neither the district court pleadings file copy, nor counsel's file copy indicate a date of service), but not to Mr. Ruesga. The trial court did not mention the additional conditions on this document when he sentenced Mr. Ruesga.

Mr. Ruesga did not speak to defense counsel prior to the

encounter with the probation officers, and when they presented him with the probation agreement to sign, including conditions of probation that Mr. Ruesga had not been forewarned about by the court or counsel prior to the encounter with the probation officers, Mr. Ruesga refused to sign the agreement, informing the probation officers that the conditions in the agreement were not those meted out by the court (T.4 8-11).

It was only after the probation officer filed a motion for an order to show cause why probation should not be revoked that the trial court informed Mr. Ruesga that signing the probation agreement was a condition of his probation. At the hearing on the motion for an order to show cause, Mr. Ruesga indicated that he had received the motion for an order to show cause, but did not understand it (T.2 3). Defense counsel indicated that he had advised Mr. Ruesga to deny violating his probation at that hearing, that counsel had just received the affidavit in support of probation revocation, and that a personal family emergency required counsel's immediate attention (T.2 3-4). The trial court indicated that the court would permit counsel two weeks to works things out, and informed Mr. Ruesga for the first time that signing the probation agreement was a condition of probation, stating, "If Mr. Ruesga doesn't sign the probation agreement, he's going to prison. Simple as that." (T.2 4). After Mr. Ruesga was thus informed that signing the agreement was a condition of his probation, Mr. Ruesga was consistently willing to sign (T.3 3, T.4 11, T.5 5).

The basis for revoking Mr. Ruesga's probation reflected in

the trial court's written findings is Mr. Ruesga's failure to sign the probation agreement when it was presented to him by the probation officers (R. 60). Specifically, finding number 5 indicates, "[t]hat the failure of the defendant to execute and enter into the agreement of probation constitutes a violation of the probation granted the defendant by the Court." (R. 60).

In revoking Mr. Ruesga's probation on the basis of a condition of probation that Mr. Ruesga was not informed of prior to the purported violation, the trial court violated due process of law. Buder, Hodges, Denney, supra.

II.
MR. RUESGA DID NOT WILLFULLY VIOLATE HIS PROBATION.

Under Utah Code Ann. section 77-18-1, and federal constitutional law, "[a]s a general rule, in order to revoke probation for the violation of a condition of probation not involving the payment of money, the violation must be willful or, if not willful, must presently threaten the safety of society." State v. Hodges, 798 P.2d 270, 275-77 (Utah App. 1990), cert. denied, No. 900501 (Dec. 26, 1990).

The trial court's written findings indicate that "the defendant knowingly, intentionally and purposely refused to sign the probation agreement presented to him by Agent Shavers" and "the failure of the defendant to execute and enter into the agreement of probation constitutes a violation of the probation granted the defendant by the Court." (R. 60). As explained above in point I, the findings are erroneous in that the signing of the probation

agreement was not a condition of probation at the time that Mr. Ruesga refused to sign in the jail, because the court did not inform Mr. Ruesga of that condition when he sentenced Mr. Ruesga, or otherwise indicate that a probation officer would present Mr. Ruesga with additional conditions of probation. As a corollary to the argument in point I, the record demonstrates that Mr. Ruesga's failure to sign the probation agreement was not a willful violation of probation, but was a result of his failure to understand that signing the agreement was a condition of probation.

At the first hearing, after the trial court had first informed Mr. Ruesga that signing the agreement was a condition of probation, and had granted a two week continuance, defense counsel moved to dismiss the order to show cause, indicating that Mr. Ruesga was willing to sign the probation agreement (T.3 3). After the prosecutor indicated that Mr. Ruesga should sign the agreement in open court, the trial court unexpectedly interjected, "I want to know why it hasn't been signed up to this point in time. If Mr. Ruesga is going to jerk me around, I'll jerk him around. Why did I put him on probation in the first place? What's the State's position?" (T.3 3-4). The prosecutor then indicated that perhaps the court should reconsider Mr. Ruesga's probation (T.3 4). The trial court asked defense counsel why Mr. Ruesga had not signed the agreement and defense counsel informed the court that Mr. Ruesga had not understood his obligation to do so in the past, but was willing to sign the agreement that day (T.3 5). The trial court asked defense counsel if Mr. Ruesga would admit the allegation in the

affidavit in support of the order to show cause, and defense counsel informed the court that he had advised Mr. Ruesga not to admit a violation (T.3 5-6). The probation officer, Lisa Shavers,indicated that if Mr. Ruesga would sign the agreement, she was willing to supervise him, adding that she did not like to argue with people, or profanity (T.3 6). The trial court asked Ms. Shavers what Mr. Ruesga had said when she presented the agreement, and she indicated,

> He was very profane about you and me, and how you could not do these things to him, and you can't make him do what you had ordered him to do, and so I left.

(T.3 6). Defense counsel explained that both he and Mr. Ruesga's pretrial services supervisor had had initial difficulty communicating with Mr. Ruesga, but had subsequently found him to be easy to work with (T.3 7). After Mr. Ruesga acknowledged that the court would not allow him to go to Mexico to visit his ailing parents during the course of probation, as he had been allowed to do during pretrial release (T.3 7-8), the trial court informed Mr. Ruesga that Mr. Ruesga had a "serious attitude problem," and set the matter for further hearing (T.3 8).

At the June 2, 1992 evidentiary hearing, defense counsel requested a Spanish-speaking interpreter, but the trial court summarily denied the motion, stating, "Too late. Proceed." (T.4 3).

Ms. Shavers' testimony concerning what Mr. Ruesga had said to her was markedly different from her prior testimony that Mr. Ruesga had said that the judge had no power to make him comply with the probation requirements that the judge had ordered (T.3 6). She indicated that she initially contacted Mr. Ruesga in the jail on

April 16, ten days after Judge Hanson sentenced Mr. Ruesga (T.4 5). She indicated that she and James Ferner, another probation officer, spoke with Mr. Ruesga and another inmate in the hallway of the jail, and began informing him of the general conditions of the probation agreement (T.4 5). The conditions she explained were

> That he has to report monthly between the first and the fifth. That he has to give us a correct address and let us know before he moves, not leaving the State of Utah without written permission, those kinds of things.

(T.4 5). These conditions were different from those stated to Mr. Ruesga in court at sentencing by the trial court (T. 8-9).

She indicated that when she began discussing the conditions of probation imposed by Judge Hanson, Mr. Ruesga informed her that the $1,875 fine figure she had was incorrect (it represents the correct fine plus the 25% surcharge), and became argumentative, telling her that the written agreement did not reflect what had occurred in court (T.4 6). Mr. Ruesga informed Ms. Shavers that her conditions of probation were not the same as the Judge's and that he therefore did not have to comply with them (T.4 6). She testified,

> He was extremely argumentative. He said he was not -- he was not going to comply. He said that the figure that I had for the fine of 1,875 was incorrect; that what I had written down here was not what happened in court, that -- he just became extremely profane, and argumentative, and got more and more so.
>
> He said fuck the Judge, fuck this shit, I'm not going to do it. You can't make me do it. There was another probationer sitting next to him who he told that that man also didn't have to do what we were asking, that I couldn't make him do it, and that the Judge hadn't said what I was telling him to do.
>
> ....

> He just continued to argue and state that he didn't have to do what either Judge Hanson or I was asking him to do, and he wasn't going to do it.

(T.4 6-8).

On cross-examination, Ms. Shavers testified that Mr. Ruesga had told her that her conditions of probation were not those stated by the judge, and that that was why he did not have to comply with her conditions on the agreement (T.4 8-9).

Mr. Ruesga came to the stand and read to the court a letter he had written with assistance (T.4 10-11). In the letter, Mr. Ruesga explained his difficulty with the English language, his initial failure to understand the need to sign the probation agreement, and his willingness to sign the agreement. He indicated that he had not spoken with defense counsel after sentencing and did not understand what was transpiring when the probation officers confronted him in the jail, and that he needed an interpreter (T.4 10-11). When defense counsel asked Mr. Ruesga if he had agreed to sign a probation agreement when he was sentenced in court, Mr. Ruesga indicated that he never said anything, that he had pled guilty, and that defense counsel had not spoken with Mr. Ruesga to explain the details of probation (T.4 11). Mr. Ruesga testified that he had not been on probation before, and did not understand how it worked when he refused to sign the agreement, but that since he had come to understand his obligations, he was willing to comply with them fully (T.4 11-12). On cross-examination by the prosecutor, Mr. Ruesga again indicated that he had said some words to Ms. Shavers, but did not understand what was going on because he

had not yet spoken with defense counsel (T.4 13). Mr. Ruesga denied having told Ms. Shavers that he did not have to comply with the judge's orders (T.4 14), but did tell her that he would rather just do his time in jail, rather than be on probation (T.4 14). Mr. Ruesga's letter to the trial court, and a letter from his pretrial services supervisor in support of his probation are apparently contained in the sealed envelope containing the presentence investigation report in the district court pleadings file (R. 44).

In revoking Mr. Ruesga's probation on the basis of his failure to sign the probation agreement, the trial court erroneously overlooked the fact that Mr. Ruesga's failure to sign the agreement resulted from his lack of knowledge that signing the agreement was a condition of probation, rather than from his intent to willfully violate the trial court's order. The revocation constitutes a violation of federal constitutional law. Hodges, Buder, supra.

III.
THE TRIAL COURT'S FINDINGS OF FACT ARE CLEARLY ERRONEOUS AND REQUIRE REVERSAL.

It is the State's burden to show by a preponderance of the evidence that a defendant has violated probation. State v. Hodges, 798 P.2d 270, 278-79 (Utah App. 1990). The absence of an adequate evidentiary basis for probation violation violates federal substantive due process. Douglas v. Buder, 412 U.S 430, 432 (1973)(per curiam).

In reviewing the evidence on appeal, this Court applies the deferential "clearly erroneous" standard of review. State v.

Martinez, 811 P.2d 205, 208 (Utah App.), cert. denied, 815 P.2d 241 (Utah 1991). "In order to prevail, an appellant 'must show that the evidence of a probation violation, viewed in a light most favorable to the trial court's findings, is so deficient that the trial court abused its discretion in revoking [appellant's] probation.'" State v. Rawlings, 829 P.2d 150, 152 (Utah App. 1992)(citations omitted). The written findings drafted by counsel are entitled to less deference than would have been due had the trial court drafted the findings himself. See Automatic Control Prods. Corp. v. Tel-Tech, Inc., 780 P.2d 1258, 1263 (Utah 1989)(Zimmerman, J., concurring), cited with approval in State v. Rio Vista Oil, Ltd., 786 P.2d 1343, 1347 (Utah 1990). As a general rule, "[a]n appellant raising issues of fact on appeal must, under Utah R.Civ.P. 52(a), marshall all the evidence supporting the trial court's findings, and show that evidence to be insufficient." State v. Drobel, 815 P.2d 724, 734 (Utah App. 1991). However, the marshalling requirement does not apply when the findings are legally deficient. Woodward v. Fazzio, 823 P.2d 474, 477-78 (Utah App. 1991).

Findings of fact are clearly erroneous in several different circumstances. See State v, Jackson, 805 P.2d 765, 766 (Utah App.)("A finding is clearly erroneous if it is without adequate evidentiary support or is induced by an erroneous view of the law."), cert. denied, 815 P.2d 241 (Utah 1991); State v. Bobo, 803 P.2d 1268, 1272 (Utah App. 1990)("The trial court's factual determinations are clearly erroneous only if in conflict with the clear weight of the evidence, or if this court has a 'definite and

firm conviction that a mistake has been made.'")(citations omitted); State v. Arroyo, 796 P.2d 684, 687 (Utah 1990)(to withstand appellate review, trial court's finding of fact must be supported by substantial, competent evidence; prosecutor's argument does not constitute evidence to support a finding).

The trial court's written findings, attached in Appendix 2, indicate,

> 1. That the defendant, when requested by probation officer Lisa Shavers, refused to execute a standard probation agreement.
> 2. That the terms and conditions of probation were individually explained to defendant by Agent Shavers.
> 3. That the defendant, while having a limited understanding of English, has an adequate command of the English language to fully understand the proceedings before this Court and the conditions of probation as presented by Agent Shavers.
> 4. That the defendant knowingly, intentionally and purposely refused to sign the probation agreement presented ot him by Agent Shavers.
> 5. That the failure of the defendant to execute and enter into the agreement of probation constitutes a violation of the probation granted the defendant by the Court.

While the evidence largely supports findings 1, 2, and 4, points I and II of this brief demonstrate that because Mr. Ruesga did not know that signing the probation agreement was a condition of his probation when he refused to sign it, his refusal to sign the agreement does not constitute a willful violation of a valid condition of probation. Because the trial court's fifth finding does not recognize this critical fact, and is also thus drafted with an incomplete view of the relevant law, the finding is clearly

erroneous. Cf. Jackson, Bobo, Arroyo, supra.

The trial court's third written finding, indicating that Mr. Ruesga's command of the English language was sufficient for him to understand what had occurred in court and the probation conditions stated by Agent Shavers is clearly erroneous. First, the finding fails to incorporate the law that it is the trial court's duty to articulate the conditions of probation, and that it is unfair to expand the conditions of probation retroactively to create a violation. E.g. Denney, supra. While there is some evidence to marshall in support of the facts asserted in the third finding, the evidence is insufficient when compared with other evidence in light of Utah law.

In his oral findings,[3] the trial court concluded that Mr. Ruesga understood enough English because he had not indicated a failure to understand English in prior proceedings, had participated in the Boykin process and reviewed the affidavit during the plea proceedings (the affidavit indicates that Mr. Ruesga understands English or had had an interpreter (R. 26)), and had handwritten and read the letter presented to the trial court at the evidentiary

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3. Reference to oral findings is proper practice. See e.g. Erwin v. Erwin, 773 P.2d 847, 849 (Utah App. 1989)("In assessing the sufficiency of the findings [in a domestic bench trial], ... we are not confined to the contents of a particular document entitled "Findings"; rather, the findings may be expressed orally from the bench or contained in other documents, such as the quite thorough memorandum decision of the trial court in this case.")(footnotes, citing inter alia Utah Rule of Civil Procedure 52(a), omitted). See also State v. Hodges, 798 P.2d 270, 273-74 (Utah App.)(written findings of fact are not necessary if court can discern basis of revocation from transcript and record of proceedings), cert. denied, No. 900501 (Dec. 26, 1990).

hearing (T.4 22-23).

The trial court's indication that Mr. Ruesga had not previously indicated an inability to understand (T.4 22) is clearly erroneous. At the first hearing on the order to show cause why probation should not be revoked, Mr. Ruesga indicated to the court that he had received the order to show cause, but did not understand it (T.2 3). At the second hearing, defense counsel attributed Mr. Ruesga's failure to sign the probation agreement to his failure to understand the obligation, and indicated that defense counsel and the pretrial services supervisor had initial difficulty communicating with Mr. Ruesga (T.3 5, 7). At the third hearing defense counsel repeated his concerns that Mr. Ruesga's heavy accent and previous difficulties communicating with defense counsel were indicative of his difficulty understanding the court proceedings (T.4 19).

As Mr. Ruesga testified, he had assistance composing the letter he wrote and read to the trial court (T.4 10). The same alphabet is used in Spanish and English, and Mr. Ruesga's ability to handwrite and read a letter that someone else assisted him in composing does not necessarily indicate that Mr. Ruesga had an adequate understanding of the court proceedings.

While Mr. Ruesga had participated in the Boykin process and signed the plea affidavit, testimony concerning the confrontation between Mr. Ruesga and the probation officers demonstrates that Mr. Ruesga did not have an adequate command of the English language to understand the court proceedings, and that this contributed to the

purported probation violation. For instance, Mr. Ruesga thought that Ms. Shavers presented the wrong figure when she told him that he owed a fine of $1,875 (T.4 6). The figure represents the $1,500 fine stated at sentencing, plus the 25% surcharge stated at the sentencing (T.4 6; T. 8). Mr. Ruesga's inability to understand the proceedings is demonstrated by the fact that he thought that his sentence would be eighteen months if he did not complete probation (T.4 14). The probation period ordered by the trial court was eighteen months, but the suspended sentence that Mr. Ruesga has to serve without probation is the zero to five year prison sentence (R. 33).

The trial court's cursory ruling at the outset of the evidentiary hearing in response to defense counsel's request for an interpreter, "Too late. Proceed." (T.4 3), demonstrates a failure to appreciate the significance of the need of a criminal defendant or probationer to understand the proceedings in order to exercise his rights.

In State v. Vasquez, 121 P.2d 903 (Utah 1942), the court reviewed a trial court's refusal to provide an interpreter for the defendant, whose native language was Spanish, and who also was unable to hear some of the witnesses. The court drew from cases decided under Article I section 12 of the Utah Constitution, explaining that when a defendant cannot hear or understand the proceedings, he is unable to "appear and defend in person" or to confront the witnesses against him. Id. at 905. The court discussed at length the fact that a defendant who cannot understand

the language of the proceedings cannot obtain a fair trial or meaningfully exercise his trial rights. Id. at 906. In holding that the State should provide interpreters for indigent defendants, the court noted, "Although nominally prosecuting, the state is as interested in proving the innocence as the guilt of the party charged." Id. at 906. The court concluded, "'if in any such case, the record indicates a failure to provide an interpreter has in any manner hampered the defendant in presenting his case to the jury, we shall hold a fair and impartial trial has been denied him.'" Id. at 906 (citation omitted, emphasis added). See also State v. Drobel, 815 P.2d 724, 737 (Utah 1991)("Rule 15(b), Utah Rules of Criminal Procedure, provides that a trial court 'may appoint an interpreter of its own selection....'" While this decision is a matter of discretion, our supreme court has held that it is better, in a questionable case, to err on the side of providing an interpreter. State v. Vasquez, 101 Utah 444, 121 P.2d 903, 906 (1942). . . . Failure to appoint an interpreter, however, is reversible error only when the record shows that the defendant's presentation of the case has thereby been hampered. Vasquez, 121 P.2d at 906.").

While the Vasquez and Drobel cases are set in the context of criminal trials, rather than the context of probation revocation, their principles ring true in this case. Because Mr. Ruesga did not understand English well enough, his ability to exercise all of his rights, including the right to understand the conditions of probation, was compromised. The people of this State have an interest in seeing that Mr. Ruesga has a fair opportunity to succeed

in assimilating back into society through probation. By failing to recognize the contribution that language barriers made in this case, the trial court violated Mr. Ruesga's rights and disserved society's interest in Mr. Ruesga's success. The trial court's finding that Mr. Ruesga's command of the English language was adequate is clearly erroneous. Jackson, Bobo, Arroyo, supra.

At the evidentiary hearing, the trial court found that Mr. Ruesga violated his probation by his "abuse" of Agent Shavers (T.4 21-22). This finding is clearly erroneous because it reflects a misunderstanding of the law.

The trial court never informed Mr. Ruesga that his probation was conditioned on his conversations with Agent Shavers. This was not a condition of probation, and Mr. Ruesga did not willfully violate it. See points I and II, supra. More importantly, Mr. Ruesga was not given notice that the probation revocation hearings would encompass any allegations other than his failure to sign the probation agreement, the only allegation in the order to show cause (R. 38). In revoking probation on the basis of this unwarned allegation, the trial court violated Mr. Ruesga's rights to due process of law. See State v. Martinez, 811 P.2d 205, 211 (Utah App. 1991)(if, in probation revocation, court relies on bases other than those alleged in documents initiating probation revocation, defendant is denied the due process rights to notice and the chance to present a defense), cert. denied, 815 P.2d 241 (Utah 1991); State v. Cowdell, 626 P.2d 487 (Utah 1981)(documents giving notice of grounds for probation revocation must be drawn so as to

give sufficient notice to allow a defense; court may not revoke probation on the basis of allegations or evidence not mentioned in order to show cause).

Finally, the court found that Mr. Ruesga had violated his probation in refusing to sign the probation agreement at the first hearing on the motion for an order to show cause why probation should not be revoked. The court stated,

> I think that's further enhanced by what has occurred since that was brought to my attention. One would assume if there is a misunderstanding as alleged by the defendant, that I found did not occur, but he understood what was happening, but even if that was believable, which it is not, certainly when he found out what was going to happen, one would expect him to immediately do what was necessary to remedy the situation for his first appearance in court. <u>The record will speak for itself. But his first appearance in court, according to my recollection, was further attempts to argue and explain why he didn't have to do the things he was supposed to do.</u>

(T.4 21)(emphasis added). The court indicated that there was "a clear opportunity to sign" the probation agreement, and that his refusal to sign constituted a probation violation (T.4 21).

When defense counsel sought to correct the court, and indicated that Mr. Ruesga had not refused to sign the agreement in court, the court stated,

> Not true, Mr. Scowcroft. He may have said it as he was going out the door, but he wanted to argue with me the first time he was here. I'm not going to argue with people about probation. If they don't want to be on probation, I don't care.

(T.4 23).

This finding was clearly erroneous as a matter of fact and

law.

Mr. Ruesga's only statements at that hearing wherein the court thought he had refused to sign the agreement were that he was Fernando Ruesga, and that he had seen the motion for an order to show cause, but did not understand it (T. 3).

Again, in revoking probation on the basis of an allegation that was not contained in the affidavit in support of the motion for an order to show cause why probation should not be revoked, the trial court violated Mr. Ruesga's right to due process of law. Martinez, Cowdell supra.

CONCLUSION

This probation revocation was fundamentally unfair, in violation of the State and Federal Constitutions. This Court should reverse the trial court's order revoking Mr. Ruesga's probation.

Respectfully submitted this 16 day of October, 1992.

ROGER K. SCOWCROFT
Attorney for Mr. Ruesga

ELIZABETH HOLBROOK
Attorney for Mr. Ruesga

CERTIFICATE OF DELIVERY

I, Elizabeth Holbrook, hereby certify that I have caused to be served eight copies of the foregoing to the Utah Court of Appeals and four copies of the foregoing to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 16 day of October, 1992.

ELIZABETH HOLBROOK

DELIVERED this _____ day of October, 1992.

APPENDIX 1

Statutes, Rules and Constitutional Provisions

TEXT OF STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Amendment XIV to the Constitution of the United States provides:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.
The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5.
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Article I, Section 7 of the Constitution of Utah provides:

Sec. 7. [Due process of law.]
No person shall be deprived of life, liberty or property, without due process of law.

Utah Code Ann. section 77-18-1 (1990 Repl. Vol.) provides in pertinent part:

77-18.1. Suspension of sentence--Probation--Supervision--Presentence investigation--Standards--Confidentiality--Terms and conditions-- Restitution--Termination, revocation, modification, or extension--Hearings.

. . .

(9) (a) Probation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation. Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated.

(b) Upon the filing of an affidavit alleging with particularity facts asserted to constitute violation of the conditions of probation, the court that authorized probation shall determine if the affidavit establishes probable cause to believe that

revocation, modification, or extension of probation is justified. If the court determines there is probable cause, it shall cause to be served on the defendant a warrant for his arrest or a copy of the affidavit and an order to show cause why his probation should not be revoked, modified, or extended.

(c) The order to show cause shall specify a time and place for the hearing, and shall be served upon the defendant at least five days prior to the hearing. The defendant shall show good cause for a continuance. The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed for him if he is indigent. The order shall also inform the defendant of a right to present evidence.

(d) At the hearing, the defendant shall admit or deny the allegations of the affidavit. If the defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations. The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders. The defendant may call witnesses, appear and speak in his own behalf, and present evidence.

(e) After the hearing the court shall make findings of fact. Upon a finding that the defendant violated the conditions of probation the court may order the probation revoked, modified, continued, or that the entire probation term commence anew. If probation is revoked, the defendant shall be sentenced or the sentence previously imposed shall be executed.

Utah Code Ann. section 77-23-1 (1990 Repl. Vol.) provides:

77-23-1. "Search warrant" defined.

A search warrant is an order issued by a magistrate in the name of the state and directed to a peace officer, describing with particularity the thing, place or person to be searched and the property or evidence to be seized by him and brought before the magistrate.

Rule 15 of the Utah Rules of Criminal Procedure provides:

> **Rule 15. Expert witnesses and interpreters.**
>
> (a) The court may appoint any expert witness agreed upon by the parties or of its own selection. An expert so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed. An expert so appointed shall advise the court and the parties of his findings and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party. The court shall determine the reasonable compensation of the expert and direct payment thereof. The parties may call expert witnesses of their own at their own expense. Upon showing that a defendant is financially unable to pay the fees of an expert whose services are necessary for adequate defense, the witness fee shall be paid as if he were called on behalf of the prosecution.
>
> (b) The court may appoint an interpreter of its own selection and shall determine reasonable compensation and direct payment thereof. The court may allow counsel to question the interpreter before he is sworn to discharge the duties of an interpreter.

APPENDIX 2

Written Findings of Probation Violation

DAVID E. YOCOM
Salt Lake County Attorney
WALTER R. ELLETT, 0980
Chief Deputy County Attorney
231 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, v. FERNANDO RUESGA, Defendant.	FINDINGS OF PROBATION VIOLATION AND COMMITMENT Case No. 911901842FS Honorable Timothy R. Hansen

Having heretofore adjudged the defendant guilty of the offense of Possession of a Controlled Substance, a Third Degree Felony, the Court, on the 6th day of April, 1992, imposed sentence on the defendant that the defendant be committed to the Utah State Prison for the term not to exceed five years, and was fined as provided by law for the offense of which the defendant was adjudged guilty.

The Court stayed the execution of such sentences and placed the defendant on probation in the custody of the Chief Agent, Department of Adult Probation and Parole, upon various conditions.

On the 2nd day of June, 1992, the defendant appeared in person and with counsel, Roger Scowcroft, to answer to an affidavit in support of an Order of

Show Cause in re the revocation of defendant's probation. The State was represented by Walter R. Ellett.

The Court received evidence by way of testimony and written exhibits. Exhibit number 2 was a hand written and signed statement prepared by and submitted by the defendant.

Based upon the evidence presented and considering arguments of counsel the Court finds as follows:

1. That the defendant, when requested by probation officer Lisa Shavers, refused to execute a standard probation agreement.

2. That the terms and conditions of probation were individually explained to defendant by Agent Shavers.

3. That the defendant, while having a limited understanding of English, has an adequate command of the English language to fully understand the proceedings before this Court and the conditions of probation as presented by Agent Shavers.

4. That the defendant knowingly, intentionally and purposely refused to sign the probation agreement presented to him by Agent Shavers.

5. That the failure of the defendant to execute and enter into the agreement of probation constitutes a violation of the probation granted the defendant by the Court.

From the foregoing findings the Court now enters the following order and judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the probation of the defendant Fernando Ruesga be and the same is hereby revoked.

2. It is further ordered that the Sheriff of Salt Lake County, State of Utah take the defendant Fernando Ruesga forthwith and deliver him to the

Warden, Utah State Prison, Draper, UT, where said defendant shall be confined and imprisoned in accordance with the sentence imposed on April 6, 1992.

3. It is recommended that the defendant be given credit for time served in this matter.

Dated this 9 day of June, 1992.

BY THE COURT

TIMOTHY R. HANSEN
Judge

CERTIFICATE OF DELIVERY

Delivered a copy of the foregoing Findings and Order to Roger Scowcroft, Attorney for Defendant, by placing the same in the Legal Defenders Association courier box at the Office of the Salt Lake County Attorney, 231 East 400 South, for pick-up and delivery to the said Roger Scowcroft this 3 day of June, 1992.

carol\memo\ruesga.doc

APPENDIX 3

Trial Court’s Oral Sentence

to the crime of possession of a controlled substance, a third degree felony, it's the judgment of this Court that you be committed to the Utah State Prison for the judgment, that's the indeterminate term which may be for as long as five years, and I also impose the maximum fine of $5,000. Mr. Ruesga, as I review this, while most of these records have been destroyed, I don't know what's happened, I don't make any decision one way or another in that regard, but I think that shows to me that there isn't sufficient justification for deviating from the guidelines in this case, nor am I otherwise impressed that the guidelines ought to be deviated from. I have no indication whether these prior charges were convictions, whether they ever occurred. And if the file has been destroyed, that's unfortunate, but it has. Accordingly, I do believe that you're an appropriate candidate for probation. Accordingly, I'm going to deviate from the recommendation of Adult Probation and Parole, because I can see no legal basis as to why they should deviate from the guidelines.

I am going to place you on probation for a period of eighteen months, supervised by Adult Probation and Parole under the following terms and conditions. I'll suspend all but $1,500 of the fine. Added to that is the twenty-five percent surcharge. The Court is satisfied

that terms and conditions ought to include the usual drug and alcohol conditions. You're not to use controlled substances, you're not to have paraphernalia in your possession, you're not to associate with people who use controlled substances, and you are not to have any prescriptions, or -- from a medical Doctor, without your probation officer knowing about it.

As far as alcohol, you're not to use alcohol during the period of time that you're on probation. You are to enter into, and successfully complete any drug or alcohol programs Adult Probation and Parole thinks is appropriate. Not to, like I say, use alcohol. You're not to frequent bars during the period of time that you're on probation. I want you working full-time, and I want you to establish a permanent address.

The sanction in this, Mr. Ruesga, will be that you serve six months in the county jail. I'll give you credit for the twenty-one days that you've already served. Commitment is forthwith. Take him into custody.

* * *

APPENDIX 4

Judgment, Sentence and Commitment

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

vs.

FERNANDO RUESGA (PTS)

Defendant.

JUDGMENT, SENTENCE
(COMMITMENT)

Case No. 911901842 FS
Count No. _____
Honorable TIMOTHY R. HANSON
Clerk E. THOMPSON
Reporter B. NEUENSCHWANDER
Bailiff J. WEISS
Date APRIL 6, 1992

☐ The motion of _____ to enter a judgment of conviction for the next lower category of offense and impose sentence accordingly is ☐ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☐ a jury; ☐ the court; ☒ plea of guilty; ☐ plea of no contest; of the offense of POSSESSION OF A CONTROLLED SUBSTANCE, a felony of the 3 degree, ☐ a class _____ misdemeanor, being now present in court and ready for sentence and represented by R. SCOWCROFT, and the State being represented by K. HORNAK, is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

☐ to a maximum mandatory term of _____ years and which may be for life;
☒ not to exceed five years;
☐ of not less than one year nor more than fifteen years;
☐ of not less than five years and which may be for life;
☐ not to exceed _____ years;
☒ and ordered to pay a fine in the amount of $ 5,000;
☐ and ordered to pay restitution in the amount of $_____ to _____

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4-13-92-855am.

☐ such sentence is to run concurrently with _____
☐ such sentence is to run consecutively with _____
☐ upon motion of ☐ State, ☐ Defense, ☐ Court, Count(s) _____ are hereby dismissed.
☒ THE COURT SUSPENDS ALL BUT $1,500 OF THE FINE TO BE PAID ALONG WITH A 25% SURCHARGE
☒ Defendant is granted a stay of the above (☐ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of 18 MONTHS, pursuant to the attached conditions of probation.
☐ Defendant is remanded into the custody of the Sheriff of Salt Lake County ☐ for delivery to the Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this Judgment and Commitment.
☐ Commitment shall issue _____

DATED this 6 day of APRIL, 19 92

~~APPROVED AS TO FORM~~
COPIES TO COUNSEL

_____
Defense Counsel

DISTRICT COURT JUDGE
TIMOTHY R. HANSON

ATTEST

911901842 FS

Judgment/State v. FERNANDO RUESGA /CR _____/Honorable HANSON

CONDITIONS OF PROBATION

- ☒ Usual and ordinary conditions required by the Dept. of Adult Probation & Parole.
- ☒ Serve SIX MONTHS in the Salt Lake County Jail commencing FORTHWITH, CREDIT FOR TIME SERVED.
- ☒ Pay a fine in the amount of $1,500 at a rate to be determined by the Department of Adult Probation and Parole; or ☒ at the rate of WITHIN THE PROBATION PERIOD, A 25 % SURCHARGE APPLIES.
- ☐ Pay restitution in the amount of $ _____; or ☐ in an amount to be determined by the Department of Adult Probation and Parole; ☐ at a rate of _____; or ☐ at a rate to be determined by the Department of Adult Probation and Parole.
- ☒ Enter, participate in, and complete any DRUG/ALCOHOL program, counseling, or treatment as directed by the Department of Adult Probation and Parole.
- ☐ Enter, participate in, and complete the _____ program at _____.
- ☐ Participate in and complete any ☐ educational; and/or ☐ vocational training ☐ as directed by the Department of Adult Probation and Parole; or ☐ with _____.
- ☐ Participate in and complete any _____ training ☐ as directed by the Department of Adult Probation and Parole; or ☐ with _____.
- ☒ Submit person, residence, and vehicle to search and seizure for the detection of drugs.
- ☒ Submit to drug testing.
- ☒ Not associate with anyone who illegally uses, sells, or otherwise distrubutes narcotics or drugs.
- ☒ Not frequent any place where drugs are used, sold, or otherwise distributed illegally.
- ☒ Not use or possess non-prescribed controlled substances.
- ☒ Refrain from the use of alcoholic beverages.
- ☒ Submit to testing for alcohol use.
- ☒ Take antabuse ☒ as directed by the Department of Adult Probation and Parole.
- ☒ Obtain and maintain full-time employment.
- ☐ Maintain full-time employment.
- ☐ Obtain and maintain full-time employment or full-time schooling.
- ☐ Maintain full-time employment or obtain and maintain full-time schooling.
- ☐ Defendant is to have no contact nor associate with _____.
- ☐ Defendant's probation may be transferred to _____ under the Interstate Compact as approved by the Department of Adult Probation and Parole.
- ☐ Complete _____ hours of community service restitution as directed by the Department of Adult Probation and Parole.
- ☐ Complete _____ hours of community service restitution in lieu of _____ days in jail.
- ☒ Defendant is to commit no crimes.
- ☐ Defendant is ordered to appear before this Court on _____ for a review of this sentence.
- ☒ THE DEFENDANT IS TO ESTABLISH RESIDENCY.
- ☐ _____.
- ☐ _____.
- ☐ _____.
- ☐ _____.
- ☐ _____.

DATED this 6 day of APRIL, 19 92

DISTRICT COURT JUDGE
DOROTHY R. HANSON

ATTEST